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Elder Law

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Elder Law: 1993 Leading Cases and Significant Developments in Florida Law

Jerome Ira Solkoff

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I. INTRODUCTION

The term "elder law" came into vogue in 1989 when the National Academy of Elder Law Attorneys ("NAELA") was founded. The term is not widely understood. Traditional estate planning involved only the provision for the orderly disposition of assets after death through the use of trusts, wills and other mechanisms. *Elder law attorneys* broaden the definition of estate planning.

Elder law practitioners believe that the main focus of estate planning should be to meet one's *lifetime* needs and, once those needs are properly addressed, to utilize the more traditional estate planning methods.¹ Lifetime needs of the elderly include the following: access to and the ability to refuse health care; access to insurance and government benefits; freedom from physical, emotional, and financial abuse; freedom from age discrimination; access to public facilities and courts; preservation of privacy, independence, control, autonomy, lifestyle, and wealth; and financial security.

A holistic approach is requisite to the practice of elder law. The attorney acts not only as a preparer of documents but truly as a "counselor at law." Often, the services of experts in other disciplines such as geriatric care managers, gerontologists, social workers, psychologists, psychiatrists and family counselors are utilized.

Thus, elder law attorneys concern themselves with a broad range of issues. With that in mind, this article now turns to four areas of the practice that have undergone significant changes in the past year. These developments are in the areas of probate matters, trust administration, powers of attorney, and Medicaid.

II. PROBATE MATTERS

A. Attorneys' Fees

The Florida Supreme Court decision, *In re Estate of Platt*,² radically changed the determination of attorneys' fees in probate matters. Prior to this decision, courts had consistently upheld judicial awards of attorneys'

1. For a more detailed treatment of the emerging field of Elder Law, see Jerome I. Solkoff, *Elder Law: Coming of Age*, NEW CONNECTIONS FOR ELDERS: LAW AND SOCIAL SERVICES 1 (1992) (available from The Florida Bar).

2. 586 So. 2d 328 (Fla. 1991).

fees based on percentages of the probate estate.³ In *Platt*, however, the Florida Supreme Court found the use of a sliding percentage scale not to comport with section 733.617(1) of the Florida Statutes in its call for “reasonable” fees based upon certain enumerated factors.⁴ The decision left many unanswered questions and even more disturbing results. For example, probate attorneys could no longer precisely estimate their legal fees for the purpose of the estate’s deductibility on the Federal Estate Tax Return.⁵ Even more damaging was the potential for obscenely high fees resulting from the mandated “lode-star” approach.⁶

In response to the difficulties implied by *Platt*, the Florida Legislature enacted section 733.6171, which became effective October 1, 1993.⁷ Computations and collection of attorneys’ fees on or after that date will be strictly governed by the new legislation.⁸ While reasonable compensation may be payable from the assets of the estate without court order, the determination of what is “reasonable” is based on new criteria. Such compensation may now be determined under several formulas:

1. Based on agreement between the attorney, personal representative and heirs; or
2. Based on a manner disclosed in a petition for discharge or final accounting provided there is no objection filed thereon pursuant to existing section 733.901; or
3. As set by a court after hearing; or
4. Based on written agreement between the attorney and decedent disclosed to the personal representative prior to engagement of the attorney and served on all interested persons. (Such agreement may not mandate that the personal representative engage such attorney.); or
5. Based on the following statutory prescription for “ordinary” services:

3. See, e.g., *In re Estate of Platt*, 546 So. 2d 1114 (Fla. 4th Dist. Ct. App. 1989), *quashed*, 586 So. 2d 328 (Fla. 1991); see also *In re Estate of Warwick*, 543 So. 2d 449 (Fla. 4th Dist. Ct. App. 1989), *quashed*, 586 So. 2d 327 (Fla. 1991).

4. *In re Estate of Platt*, 586 So. 2d at 335-36; see FLA. STAT. § 733.617(1) (1989).

5. See *In re Estate of Platt*, 586 So. 2d at 328.

6. *Id.* at 329-30.

7. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2503 (to be codified at FLA. STAT. § 733.6171(4)).

8. See generally Senator Fred R. Dudley, *Platt Fees Revisited: The Statutory Response*, Lecture at The Florida Bar Real Property, Probate & Trust Law Section’s Legislative Update and Case Review Seminar (July 14, 1993) (lecture outline on file with The Florida Bar).

- a) For "professional responsibility"—two percent of the monetary value of the estate assets plus one percent of the balance of the gross estate as finally determined for federal estate tax provisions; plus
- b) For "professional time expended"—by multiplying the "reasonable hours" expended by a "reasonable" hourly rate.⁹

These means of determining fees are flexible. Any interested person may seek an increase or decrease in the "ordinary" compensation by court petition and hearing, and, of course, agreements may change the prescription.¹⁰ In addition, no expert testimony will be required by the court to determine "reasonable compensation," but persons can offer such testimony after notice to interested persons.¹¹ Costs of such expert witness fees and attorneys fees, including that of the personal representative, are to be paid out of the estate assets as determined by the court.¹²

The prescription of "ordinary" fee computations has caused much controversy among attorneys. Some attorneys fear that the courts will use the prescription to impose an unreasonable "cap" on fees, despite the fact that other ways to determine fees are set forth in the statute. The outcome of the legislation certainly would be to force attorneys to give special heed when preparing retainer agreements. Perhaps explicit provisions as to attorneys' fees will become more common in wills.

B. *Personal Representatives' Fees*

In addition to the above changes, Florida Statutes section 733.617 has been substantially revised as to computations of personal representatives' fees.¹³ The new provisions affect estates of decedents who die on or after October 1, 1993.¹⁴

Florida Statutes section 733.617, as revised, provides that ordinary service fees may be payable from estate assets without a court order, and are to be determined in one of several ways:

9. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2504 (to be codified at FLA. STAT. § 733.6171(4)).

10. *Id.* § 4, 1993 Fla. Laws at 2504 (to be codified at FLA. STAT. § 733.6171(4), (5)).

11. *Id.* § 5, 1993 Fla. Laws at 2507 (to be codified at FLA. STAT. § 733.6171(5)).

12. *Id.*

13. Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2507 (amending FLA. STAT. § 733.617 (1991)).

14. *Id.* § 18, 1993 Fla. Laws at 2512.

1. Based on will provisions which will act as a “cap” on fees paid;¹⁵ or
2. Based on written contract with the decedent;¹⁶ or
3. Based on percentages set forth in the statute, with leeway for the court to award greater compensation for extraordinary services such as for sale of realty, litigation, tax proceedings and conduct of the decedent’s business.¹⁷ The statute prescribes percentage fee formulas for “ordinary” services unless there is agreement otherwise. The prescriptions are:
 - a) Three percent of the first \$1 million;¹⁸
 - b) Two and one-half percent of the next \$4 million;¹⁹
 - c) Two percent of the next \$5 million;²⁰ and
 - d) One and one-half percent of the excess over \$10 million.²¹

Obviously, the fees earned by the personal representative can be much more than that earned by the attorney for the estate. If there are two personal representatives, each is entitled to full commissions unless the estate is worth less than \$100,000.²² In such smaller estates, only one commission is to be paid, “apportioned” between the two personal representatives based on services rendered by each.²³ If there are more than two personal representatives, two full commissions are to be paid and apportioned amongst them.²⁴ However, the one who had “possession of and primary responsibility for administration of assets” can receive one of the two full shares.²⁵ If the estate is worth less than \$100,000, only one

15. *Id.* § 10, 1993 Fla. Laws at 2508 (amending FLA. STAT. § 733.617(3) (1991), to be codified at FLA. STAT. § 733.617(4)).

16. *Id.*

17. *Id.* (amending FLA. STAT. § 733.617(1) (1991), to be codified at FLA. STAT. § 733.617(3)).

18. Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2507 (amending FLA. STAT. § 733.617 (1991), appearing at FLA. STAT. 733.617(2)(a)).

19. *Id.* (amending FLA. STAT. § 733.617 (1991), appearing at FLA. STAT. § 733.617-(2)(b) (1993)).

20. *Id.* (amending FLA. STAT. § 733.617(1991), appearing FLA. STAT. § 733.617(2)(c) (1993)).

21. *Id.* (amending FLA. STAT. § 733.617 (1991), appearing at FLA. STAT. § 733.617-(2)(d) (1993)).

22. *Id.* at 2508 (amending FLA. STAT. § 733.617 (1991), appearing at FLA. STAT. § 733.617(5) (1993)).

23. Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2508 (amending FLA. STAT. § 733.617 (1991), appearing at FLA. STAT. § 733.617(5)).

24. *Id.*

25. *Id.*

full commission is to be paid and apportioned amongst the multiple personal representatives based on the services that each render.²⁶ A member of The Florida Bar who serves the dual function of personal representative and attorney for the estate can receive both attorney and personal representative fees.²⁷

III. TRUST ADMINISTRATION

Sweeping changes in the administration of ordinary living trusts were made this past year by the Florida Legislature. The changes effect trusts of decedents who die on or after October 1, 1993,²⁸ but provisions as to payment of estate expenses and obligations by trusts do not become effective until January 1, 1994.²⁹

A. *Personal Representative May Claim Trust Assets*

Section 733.607(2) of the Florida Statutes was enacted to allow personal representatives of an estate to reach trust assets when the probate estate is insufficient to pay expenses of administration and proper creditor claims.³⁰ To do so, the personal representative must certify in writing to the trustee that the probate estate is insufficient, and serve a copy of the notice of administration on the trustee of the trust.³¹

B. *Some Trusts are Exempt from Claims*

Not all trusts are subject to the claims of personal representatives and/or creditors. Only personal living trusts, which are revocable and are created to benefit the settlor during his or her lifetime, and which upon revocation would revert to the settlor, are subject to such claims.³² Claims of a personal representative do not apply to: (1) insurance proceeds payable

26. *Id.*

27. *Id.* (amending FLA. STAT. § 733.617 (1991), to be codified at FLA. STAT. § 733.617(6)).

28. Ch. 93-257, § 18, 1993 Fla. Laws 2500, 2512.

29. *Id.* § 14, 1993 Fla. Laws at 2509 (to be codified at FLA. STAT. § 737.3056).

30. *Id.* § 9, 1993 Fla. Laws at 2507 (amending FLA. STAT. § 733.607 (1991), appearing at FLA. STAT. § 733.607(2) (1993)).

31. *Id.*

32. *Id.* § 11, 1993 Fla. Laws at 2508 (amending FLA. STAT. § 733.707 (1991), appearing at FLA. STAT. § 733.707(3) (1993)).

directly to a trust;³³ (2) a trust in which the settlor had provided that the assets would go to another upon revocation;³⁴ (3) retirement plans;³⁵ or (4) to Qualified Domestic Relations Orders described in section 414(p) of the Internal Revenue Code.³⁶

C. Trustees' Duties as to Claims

Florida Statutes section 737.3056 expressly states that the duty of the trustee is to pay estate administration expenses and claims.³⁷ If there is a probate proceeding, the trustee must be served with a copy of the notice of administration before trust assets will be subject to the claim of a personal representative.³⁸ However, if there is no probate proceeding, the trustee must pay creditors directly.³⁹

Contribution from others cannot be demanded by the trustee unless the settlor expressly so provided in the trust agreement.⁴⁰ For example, the settlor may provide that a summer home go to A, and may state that A should pay all claims and expenses arising out of the existence, care, management, mortgage and taxes of such home. The settlor also may direct which trust assets are to be used to pay such claims; the direction can be made in the settlor's will or trust document.

If no express direction is made, claims are to be paid out of the trust assets in the following order: 1) out of the trust residuary;⁴¹ 2) out of assets not to be distributed as specified property;⁴² and, 3) out of assets distributed as specified property.⁴³ Specified property, barring a directive otherwise, is not to be utilized to pay claims unless the other assets are

33. Ch. 93-257, § 11, 1993 Fla. Laws 2500, 2509 (amending FLA. STAT. § 733.707 (1991), appearing at FLA. STAT. § 733.707(3)(c)).

34. *Id.*

35. *Id.* (amending FLA. STAT. § 733.707 (1991), appearing at FLA. STAT. 733.707(3)(a) (1993)).

36. *Id.* (amending FLA. STAT. 733.707 (1991), appearing at FLA. STAT. 733.707(3)(b) (1993)).

37. *Id.* § 14, 1993 Fla. Laws at 2509 (appearing at FLA. STAT. § 737.3056).

38. Ch. 93-257, § 14, 1993 Fla. Laws 2500, 2509 (to be codified at FLA. STAT. § 737.3056(1)).

39. *Id.*

40. *Id.*

41. *Id.* (to be codified at FLA. STAT. § 737.3056(2)(a)).

42. *Id.* (to be codified at FLA. STAT. § 737.3056(2)(b)).

43. Ch. 93-257, § 14, 1993 Fla. Laws 2500, 2510 (to be codified at FLA. STAT. § 737.3056(2)(c)).

insufficient.⁴⁴ The shares of all persons in a class of trust beneficiaries are to be used to satisfy claims so as to treat all equally.⁴⁵

For example, a trust may provide that XYZ corporate stock is to go to the daughter, each grandchild is to receive five thousand dollars, and the remainder of the trust estate is to go to the son. Barring a directive otherwise, the son's share will be accessed first to pay claims. If the son's share is exhausted, then the grandchildren's shares will be accessed. Only when those shares are exhausted will the stock be used to pay claims. Obviously, this may be contrary to the settlor's intent of leaving the bulk of the estate to the son while providing less to the daughter.

Prior to payment of claims and expenses of probate administration from trust assets, all costs and expenses of trust administration, including trustee fees and attorneys' fees, are to be paid.⁴⁶ This poses the question of whether a trustee may hold back anything to cover additional anticipated trustee and attorneys' fees.

D. Notice to Creditor

Section 737.3057 of the Florida Statutes states that a trustee must notify creditors when there is no probate administration. The notice provisions are similar to those presently used when there is probate administration.⁴⁷ Moreover, a trustee, like a personal representative, must make diligent efforts to discover creditors and to notify them.⁴⁸

One reason why persons enter into trust agreements is to avoid the time and expense of probate proceedings, and to avoid the need to pay attorneys' fees in the future. This new legislation will add time and expense to trust administration and may force a trustee to consult with attorneys more often. Perhaps another reason persons enter into trust agreements is to avoid creditors' claims. However, this no longer seems a valid reason for the creation of trusts. Creditors will have claim rights and are to be paid by trustees. Depending upon one's point of view, Florida Statutes section 737.3057 may be either a boon or a bane in that settlors may not so easily hide their assets from creditors.

44. *Id.* (to be codified at FLA. STAT. § 737.3056(3)).

45. *Id.*

46. *Id.* (to be codified at FLA. STAT. § 737.3056(4)).

47. *Id.* § 15, 1993 Fla. Laws at 2510 (to be codified at FLA. STAT. § 737.3057).

48. Ch. 93-257, § 15, 1993 Fla. Laws 2500, 2511 (to be codified at FLA. STAT. § 737.3057(1)(c)).

IV. POWERS OF ATTORNEY

Two significant events will impact powers of attorney in the near future. The first change, one leading toward a greater efficiency of powers of attorney, has nothing to do with new case law or legislative law. Rather, the Real Property, Probate and Trust Law Section of The Florida Bar recently modified Uniform Title Standard 18.4.⁴⁹ Under the modification, homestead property can be conveyed or encumbered through the use of a power of attorney, durable or otherwise.⁵⁰ Moreover, the homestead property does not have to be described in the power.⁵¹

The change is important to elder law attorneys because durable powers of attorney can now be more acceptable tools to alienate real estate interests of a disabled elderly client. This will give more leeway for families to sell property, to raise funds for the health care of the elderly client, and/or to prepare for Medicaid planning. No longer shall the family be burdened with on-going homestead expenses while the elder disabled client is institutionalized.

Second, and on the horizon, extensive changes in the powers of attorney law⁵² are being drafted by the Real Property, Probate and Trust Law Section of The Florida Bar.⁵³ Many banks and other third parties fear the liabilities that may arise by honoring the use of powers of attorney. Thus, many banks currently do not permit their use. This proposed legislation would free third parties from liability in certain circumstances.⁵⁴ Significantly, the proposal would also subject third parties to suits for attorneys' fees should they unreasonably refuse acceptance of a power of attorney.⁵⁵ While putting the "power" back in powers of attorney, such legislation could, however, also portend the increased financial exploitation of the elderly population. Any legislation, no matter how necessary, that makes it easier for others to interpose their decisions for those of the elderly, has inherent dangers.

49. REAL PROPERTY, PROBATE & TRUST LAW SECTION, FLORIDA BAR, UNIFORM TITLE STANDARDS 18.4 (1992).

50. *Id.*

51. *Id.*

52. *See generally* FLA. STAT. §§ 709.01-709.11 (1991).

53. REAL PROPERTY, PROBATE & TRUST LAW SECTION, FLORIDA BAR, PRELIMINARY DRAFT OF PROPOSED LITIGATION § 709.08 (on file with author); *see also* REAL PROPERTY, PROBATE & TRUST LAW SECTION, FLORIDA BAR, UNIFORM TITLE STANDARDS (1992).

54. REAL PROPERTY, PROBATE & TRUST LAW SECTION, PRELIMINARY DRAFT OF PROPOSED LITIGATION § 709.08(4)(d) (on file with author).

55. *Id.* § 709.08(11).

V. MEDICAID

Perhaps the most important new legislation affecting the elder law practice is the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),⁵⁶ enacted and signed into law on August 10, 1993. Far-reaching changes were made in the Medicaid law by OBRA.

A. History

Medicaid is a federal and state program that, among other things, provides nursing home costs for persons sixty-five years of age or older. Prior to OBRA, in order to qualify for those benefits in Florida, one must have met at least five tests:

- 1) The applicant must be over sixty-five years of age and "medically needy;"
- 2) The applicant must be a United States and Florida citizen or reside in Florida under color of law;
- 3) The applicant's income from all but a few sources must be \$1302 or less per month ("income cap"); and,
- 4) The applicant can only have \$2000 or less in assets, excluding certain types of assets.
- 5) For married persons, the "community spouse" of the Medicaid applicant can only hold \$70,740 in assets, excluding certain assets ("community spousal resource allowance").⁵⁷

The "income gap" and the "community spousal resource allowance" figures were adjusted each January due to cost of living increases or decreases. Therefore, to qualify for Medicaid benefits as early as possible, one needed to plan ahead to meet the income and assets cap requirements. Three principal methods had been employed in Florida for one to plan ahead to meet those requirements.

First, a person could have "spent down" funds on health care, a home, furnishings, a car, and/or prepaid funeral arrangements.⁵⁸ Under certain

56. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

57. Florida Department of Health and Rehabilitative Services, Manual 165-22: Integrated Public Assistance Policy § 1610 (1993) [hereinafter Manual 165-22]; Florida Department of Health and Rehabilitative Services, Transmittal Notice of Jan. 1, 1993, at X.

58. See Roger A. McEowen & Neil E. Harl, *Estate Planning for the Elderly and Disabled: Organizing the Estate to Qualify for Federal Medical Extended Care Assistance*,

circumstances those assets would not have been counted to determine Medicaid eligibility. Second, one could have invested funds in non-countable assets such as specially designed annuities.⁵⁹ Third, and most common, a person could have transferred assets to family, friends, or an irrevocable, carefully worded trust. Federal and state laws, rules, and regulations, differing widely from state to state, provide guidelines for such transfers. For any uncompensated transfer, there is a disqualification period involved before the one who transfers could qualify for Medicaid benefits.⁶⁰

The Medicare Catastrophic Coverage Act of 1988 ("MECCA"),⁶¹ stated that the maximum disqualification period is thirty months from the date of transfer.⁶² Federal and state regulations have modified procedures whereby one may reduce that waiting time with the use of certain transfer procedures. In Florida, there were four principal methods of accomplishing uncompensated transfers to qualify a person for Medicaid benefits. The Florida Department of Health and Rehabilitative Services ("HRS") set forth the regulations allowing the transfers in Manual HRS:165-22.

First, one could transfer assets thirty-one months ahead of time.⁶³ Second, a lesser disqualification period was allowed by dividing the uncompensated value by a factor set by HRS that was purported to reflect the average monthly costs of a nursing home.⁶⁴ The factor in Florida is an unrealistically low \$2,400.⁶⁵ As a practical matter, the author cannot provide the name of a single nursing home that will charge such a low monthly rental. Thus, if one were to transfer \$60,000 in assets, dividing that amount by \$2,400 would mean a twenty-five month disqualification period beginning the first day of the month of transfer.

A third method was to do transfers in stages. For example, Ella Der needs to transfer \$45,600 in assets to qualify for Medicaid benefits. If Ella does the transaction in one lump sum, she must wait nineteen months before Medicaid entitlement.⁶⁶ However, if Ella were to transfer \$24,000 in one

24 IND. L. REV. 1379, 1398 (1990).

59. Manual 165-22, *supra* note 58, §§ 1625.65.00, 1625.65.10.

60. *Id.* § 1630.30.10.

61. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (1988).

62. *Id.*

63. Manual 165-22, *supra* note 58, §§ 1630.20.00-1630.20.25.

64. *Id.* § 1630.30.10.

65. *Id.*

66. \$45,600 divided by \$2400 = 19 months.

month,⁶⁷ and then transfer another \$21,600 the next month,⁶⁸ she would cut the waiting period from nineteen months to ten months. Such a cut in the waiting period would occur because each transaction would stand on its own, and the separate disqualification periods would run concurrently.

However, the most common method of transfers in Florida has been the "joint account route" in which each person whose name is on a joint account, is deemed to own one hundred percent of that account. Therefore, if a son, as a joint account holder, withdrew the funds, he is deemed to have withdrawn his own monies. Thus, there would be no disqualification period because the Medicaid applicant or spouse did not make the transfer.

Once transfers were made, it was most common to have the funds or assets held in an irrevocable special needs trust created by persons other than the Medicaid applicant and his or her spouse. The trust would protect the elders from possible financial abuse, provide strict standards for the trustees to follow, avoid some tax problems, and avoid claims of the children's (or others') creditors.

B. *The New Law*

Most of the methods of doing uncompensated transfers are now disallowed.⁶⁹ No longer is there a thirty month "look back" period.⁷⁰ Any transaction done within thirty-six months will trigger a disqualification period.⁷¹ Moreover, if one's assets were put into a trust, under some circumstances, the "look back" period is sixty months.⁷² The "look back" period ends when the individual is institutionalized *and* applies for Medicaid benefits.⁷³ Thus, if one were to enter a nursing home January 1, 1994 and apply for benefits that day, the authorities would check for transactions going back to January 1, 1991. If one transfers assets thirty-seven months prior to institutionalization and applies for Medicaid benefits without a prohibited trust involved, there will be no disqualification period.

67. \$24,000 divided by \$2400 = 10.

68. \$21,600 divided by \$2400 = 9.

69. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 107 Stat. 312, 622 (1993) (amending 42 U.S.C. § 1396p (1988)).

70. *Id.* (amending 42 U.S.C. § 1396p(c)(1)(A) (1988), to be codified at 42 U.S.C. § 1396p(c)(7)(B)(i) (1993)).

71. *Id.*

72. *Id.*

73. *Id.* (amending 42 U.S.C. § 1396p(c)(1)(B) (1988), appearing at 42 U.S.C. § 1396p(c)(1)(B)(ii)(I) (1993)).

Unlike the old law, the disqualification period under OBRA is opened and can be longer than the previous thirty month cap.⁷⁴ The disqualification period is computed by dividing the value of the uncompensated transfer by the \$2,400 factor.⁷⁵ Thus, similar to the old law, if one transfers assets worth \$60,000, the disqualification period would still be twenty-five months.⁷⁶ But if one transfers \$120,000 in assets, the period will be fifty months, not thirty.⁷⁷ Furthermore, the disqualification period commences on the first day of the month the uncompensated transfer is made.⁷⁸

Trusts that were created by the Medicaid applicant or were funded with the assets of the applicant or his or her spouse would be governed by the new stringent rules.⁷⁹ The assets would be counted as available to the individual if the trust were revocable. If irrevocable, the income or corpus used to generate that income would be counted if any portion of income and/or principal could be used for that individual.

Certain trusts created for someone under sixty-five and disabled, or which consist of only pension monies, and in which provisions are made for the State to receive full reimbursement for benefits paid after the death of the applicant, will not be counted as available to an individual.⁸⁰ Annuities can be considered trusts.⁸¹ The "joint account route" and transactions whereby others change ownership or control of the Medicaid applicant's assets are now treated as transfers made by the applicant or spouse, and trigger a disqualification period.⁸²

The new legislation also mandates strict recovery procedures whereby states are to be reimbursed for benefits paid, after the death of the Medicaid

74. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 107 Stat. 312, 622 (1993) (amending 42 U.S.C. § 1396p(c)(1) (1988)).

75. *Id.* (amending 42 U.S.C. § 1396p(c)(1) (1988), appearing at 42 U.S.C. § 1396p(c)(1)(E)(ii) (1993)).

76. *See id.*

77. *See id.*

78. *Id.* (amending 42 U.S.C. § 1396p(c)(1)(1988), appearing at 42 U.S.C. § 1396p(c)(1)(D) (1993)).

79. Omnibus Budget Reconciliation Act of 1993, A.G.C. No. 103-66, § 13611, 107 Stat. 312, 122-25 (1993) (amending 42 U.S.C. § 1396p (1988), appearing at 42 U.S.C. § 1396p(d)(3)(A) (1993)).

80. *Id.* (amending 42 U.S.C. § 1396p (1988), appearing at 42 U.S.C. § 1396p(d)(4)(A) (1993)).

81. *Id.*

82. *Id.* (amending 42 U.S.C. § 1396p(c)(3) (1988), appearing at 42 U.S.C. § 1396p(c)(2)(E) (1993)).

recipient, out of certain insurance proceeds, probate assets, and other assets.⁸³

C. Outcome

The result of OBRA 1993 is the elimination of many options persons can use to plan ahead for Medicaid qualifications. The following options are still allowed: (1) transfers thirty-seven months in advance of need; (2) transfers of some assets triggering a disqualification period while holding back funds sufficient to cover the nursing home costs during the disqualification period; and (3) the implementation of "spend-down" theories. New trusts must be carefully drafted to provide no income or principal allowances to the Medicaid applicant or spouse and must be funded with assets of other persons.

The true and complete meaning of OBRA cannot be determined until the United States Health Care Finance Administration and Florida's Department of Health and Rehabilitative Services have promulgated rules and regulations interpreting the law. Regardless, OBRA provides ample latitude for many interpretations of its provisions, which will create controversy in the future. OBRA awaits many tests in the courts.

83. *Id.*